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7  
8 BEFORE THE STATE OF CALIFORNIA WATER RESOURCES CONTROL BOARD  
9

10 In the matter of

11 CENTRAL COAST REGIONAL WATER  
12 QUALITY CONTROL BOARD

13 vs.

14 LOS OSOS COMMUNITY SERVICES  
15 DISTRICT

**MEMORANDUM OF POINTS AND  
AUTHORITIES**

In support of Petition For Review of Order on  
Administrative Civil Liability Complaint No. R-  
3-2005-0137

16 Order Filed: January 5, 2006  
17

18 The Los Osos Community Services District ("District") hereby submits its Memorandum  
19 of Points and Authorities in support of its Petition For Review of Order on Administrative  
20 Liability Complaint No.R-3-2005-0137 ("ACL Complaint") issued by the Central Coast  
21 Regional Water Quality Control Board ("RWQCB") on January 5, 2006 ("Order").

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1 I.

2 **INTRODUCTION AND PROCEDURAL HISTORY**

3 On October 6, 2005 the Executive Officer of the RWQCB issued the ACL Complaint  
4 alleging (1) violation of Time Schedule Order No.00-131 ("TSO") in that the District missed  
5 deadlines in pursuing construction of a sewage treatment plan, and (2) violation of the Basin  
6 Plan's prohibition of discharges from on-site disposal systems within a geographic "Prohibition  
7 Zone" in that the District operates on-site disposal systems in Baywood Estates, Vista de Oro,  
8 and at a fire station, all of which are located within the Prohibition Zone. The ACL Complaint  
9 recommends that the RWQCB impose a civil liability of \$11,190,000 upon the District. A copy  
10 of the ACL Complaint is found as Item 25 of the District's Partial Administrative Record  
11 ("PAR"), submitted concurrently herewith under separate cover.

12 Hearing on the ACL Complaint began on December 1, 2005, was continued to December  
13 2, 2005, and then continued again to January 5, 2006. At the conclusion of the hearing, the  
14 RWQCB issued an Order imposing civil liability in the amount of \$6,567,000 for violation of the  
15 Basin Plan and \$60,000 for violation of the TSO, resulting in a total civil liability of \$6,627,000  
16 (PAR 44).<sup>1</sup>

17 II.

18 **SUMMARY OF ARGUMENT**

19 The RWQCB's Order should be vacated and the ACL Complaint dismissed for  
20 procedural and substantive reasons.

21 **A. Procedural Deficiencies**

22 Procedurally, the District's due process rights were violated in that the District was given  
23 less than two months to prepare for the hearing and was denied its desire to use special counsel.  
24 Given the magnitude and complexity of this matter, the RWQCB's rush to judgment worked a  
25 severe prejudice on the District. In addition, the District was subjected to contradictory  
26 evidentiary rulings by the Chair, who frequently imposed deadlines then later retracted them, and  
27

28 <sup>1</sup> The \$6,567,000 penalty accrued during the tenure of District Board Members Stan Gustafson, Richard LeGros, and Gordon Hensley. The \$60,000 penalty accrued under the "new Board" that took office after the recall election.

1 made evidentiary rulings then later reversed himself. The taking of evidence was opened and  
2 closed more often than a bad mystery novel, and the RWQCB did not even follow its own  
3 published rules and regulations regarding the conduct of administrative hearings. Finally, within  
4 minutes of the RWQCB going into deliberations on the ACL Complaint, its counsel announced  
5 that the RWQCB had just filed suit in superior court taking a position against the District on an  
6 initiative known as "Measure B." Measure B was a focal point of the instant ACL proceedings.

7 The RWQCB also used the ACL process to circumvent the provisions of Water Code  
8 section 13360, which precludes the RWQCB from mandating a particular means to comply with  
9 discharge requirements. Here, the RWQCB openly admits that it is using the ACL process to  
10 compel construction of a wastewater treatment plant at a particular location known as "Tri-W,"  
11 *not* to ensure that illegal discharges stop or that the District comply with the TSO. The RWQCB  
12 Executive Officer has stated that RWQCB staff has not, and will not, work with the District in  
13 implementing an alternative means to comply with Basin Plan requirements.

14 The RWQCB's use of the ACL process here is also discriminatory, for the Executive  
15 Officer announced that other alleged violators of the Basin Plan's Prohibition Zone will not be  
16 subject to ACL Complaints; instead, they will be prosecuted by issuance of Cleanup and  
17 Abatement Orders and/or Cease and Desist Orders---both of which have notice and opportunity  
18 to cure provisions that were not provided to the District.

19 The RWQCB's Order, itself, is vague and ambiguous in that it does not specify which  
20 findings relate to the Basin Plan violation and which relate to the TSO violation. Absent such  
21 clarity, the Order does not "connect the dots" and provide a nexus between the allegations in the  
22 ACL Complaint and the civil liability imposed.

23 **B. Substantive Deficiencies**

24 From a substantive perspective, as to the alleged violations of the Basin Plan Prohibition,  
25 the findings in the Order are not supported by the evidence; in particular, the commencement  
26 date for calculation of the liability is arbitrary and beyond the scope of the ACL Complaint.  
27 Further, the amount of liability imposed is violative of Water Code provisions in that there is no  
28 evidence to support the District's ability to pay over \$6.6 million or that the District is culpable

1 to the degree warranting such a large liability. There is a plethora of evidence showing that the  
2 District's assets are earmarked or encumbered by law and, as such, unavailable to satisfy civil  
3 liability. Coupled with the fact that the District was precluded both by law and the actions of the  
4 SWRCB from furthering construction at the Tri-W site, it is clear that the RWQCB imposed  
5 punitive liability, thereby exceeding its authority to impose only enough liability to motivate  
6 compliance with RWQCB requirements. Lastly, in imposing civil liability for violation of the  
7 Basin Plan, the RWQCB failed to follow SWRCB Enforcement Guidelines.

8 As to the substantive failings of the Order as it relates to the TSO violation, the District  
9 disputes the RWQCB's conclusion that the District can and should be held responsible for **ALL**  
10 dischargers in the Prohibition Zone. The findings in the Order are not supported by the evidence  
11 in that the imposed liability is based on construction of a project for the entire Prohibition Zone,  
12 and the amount of the liability violates Water Code Section 13327 in that there is no evidence  
13 that the District can pay such liability or that the District is in any way culpable in violating the  
14 TSO, for it was impossible for the District to comply with the TSO after October, 2002.

15 Below is a Statement of Relevant Facts setting forth, and documenting, the factual basis  
16 for the District's arguments herein followed by a legal analysis that applies the facts to the law---  
17 an analysis that compels vacating the RWQCB's Order and dismissal of the ACL Complaint.

### 18 III.

#### 19 **STATEMENT OF RELEVANT FACTS**

##### 20 **A. Background<sup>2</sup>**

21 The community of Los Osos is located in an unincorporated portion of San Luis Obispo  
22 County, west of the City of San Luis Obispo and south of Morro Bay on the Pacific Ocean. The  
23 community has about 15,000 residents, most of whom rely on on-site septic systems for  
24 wastewater management.

25 The Los Osos Community Services District is a special district operating pursuant to the  
26 provisions of the California Government Code. Formed in 1998 (PAR 4), the District inherited

27 \_\_\_\_\_  
28 <sup>2</sup> In an effort to be brief, only the most relevant facts are presented here. A more detailed factual summary of events  
from 1983 to the filing of the ACL Complaint is attached hereto as Exhibit A and the PAR filed under separate  
cover.

1 several distinct zones of benefit from the County of San Luis Obispo (PAR 5)---all of which are  
2 financed and funded in accordance with California law, including the limitations imposed by  
3 Article XII of the California Constitution (PAR 8). In essence, and of critical importance here,  
4 the District operates on a fee-for-services basis. **The District does not collect property taxes,**  
5 **business taxes, occupancy taxes, sales taxes, or any other taxes to maintain a “general**  
6 **fund.”** (Govt. Code Section 61144)

7 Article XIII of the California Constitution and Government Code Section 50076 state that  
8 (absent a voter-approved special tax) the District may only impose rates and charges that  
9 reasonably relate to the services provided. This means, for example, that water revenues must be  
10 used for water services---**they cannot be used to subsidize other services such as fire**  
11 **protection, sewers or street lighting.** Thus, exacting civil penalties against the Fire  
12 Department, the Vista de Oro zone of benefit or the Bayridge Estates zone of benefit will result  
13 in either (1) the payment of such penalties, which would curtail vital services, or (2) the non-  
14 payment of such penalties, which would maintain the *status quo* as to the level of vital services.  
15 A specific financial analysis of the Fire Department, Vista de Oro zone of benefit, and Bayridge  
16 Estates zone of benefit is set forth below.<sup>3</sup>

#### 17 1. **The Fire Department**

18 The District, pursuant to Fund 300, contracts with the County to provide fire protection  
19 and emergency services. These services are funded by property taxes, special taxes, and  
20 reserves. At the end of FY 2005-2006 the estimated ending balance (reserves) for Fund 300 is  
21 approximately \$669,000 (PAR 8). It is undisputed that the Fire Department simply does not  
22 have the resources to respond to the imposed civil liabilities of over \$6.5 million. It is also  
23 undisputed that the Fire Department only discharges about 1000 gallons per day into the  
24 groundwater basin.

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27 \_\_\_\_\_  
28 <sup>3</sup> Further explanation of how the District's finances work is found at PAR 42, pgs. 7-15, and further explanation of  
zones of benefit is found at PAR 41, p. 223 et seq.



1                               **2.     Vista de Oro**

2           The District, pursuant to Fund 400, provides drainage, street lighting, and septic tank  
3 maintenance to the approximately 60 residential units in this benefit zone. These services are  
4 funded primarily through special charges that are included on property tax bills. The anticipated  
5 ending balance for FY 2005-2006 for Fund 400 is approximately \$20,000 (PAR 8). It is  
6 undisputed that the Vista de Oro benefit zone does not have the resources to respond to the  
7 imposed civil liabilities of over \$6.5 million. It is also undisputed that Vista de Oro only  
8 discharges about 27,000 gallons per day into the groundwater basin.

9                               **3.     Bayridge Estates**

10          The District, pursuant to Fund 200, provides drainage, street lighting, septic tank  
11 management and open space management to approximately 140 residential units in this zone of  
12 benefit. These services are funded through special charges and a small portion of property taxes  
13 that are collected via property tax bills. The anticipated ending balance for FY 2005-2006 for  
14 Fund 200 is approximately \$32,000 (PAR 8). It is undisputed that the Bayridge Estates zone of  
15 benefit does not have the resources to respond to the imposed civil liabilities of over \$6.5  
16 million. It is also undisputed that Bayridge Estates only discharges about 27,000 gallons per day  
17 into the groundwater basin.

18                           **B.     The Prohibition Zone**

19          The Water Quality Control Plan for the Central Coast Region ("Basin Plan") prohibits  
20 discharges from on-site disposal systems within a geographically defined "Prohibition Zone"  
21 after November 1, 1988 (PAR 1 and 2). Significantly, the boundaries of the Prohibition Zone are  
22 not the same as the boundaries of the District, but is an "overlay" zone that overlaps many of the  
23 District's zones of benefit (PAR 5 and 45). Septic systems for the Fire Department, Vista de  
24 Oro, and Bayridge Estates all operate within the Prohibition Zone. In 1999, shortly after the  
25 District was formed, the RWQCB issued Cease and Desist Orders for each of these three  
26 discharge locations (PAR 9, 10, and 11). These Cease and Desist Orders mandated construction  
27 of a community wastewater treatment plant.

28    ///

1 The Prohibition Zone is not a zone of benefit, so the District does not collect revenues  
2 from residents within the Prohibition Zone because it provides no services to them (other than  
3 those provided and paid for through the zones of benefit). The only monies collected from and  
4 for the Prohibition Zone are (1) assessment district revenues, which are dedicated funds already  
5 spent on commencing a wastewater treatment facility project, (2) grant funds, which are  
6 dedicated funds that have been spent on purchasing property for a wastewater treatment facility,  
7 and (3) State Revolving Fund ("SRF") loan proceeds, which are dedicated funds committed to  
8 the wastewater treatment plant pursuant to the SRF loan agreement. It is undisputed that none of  
9 these three funding sources can be legally used to respond to civil liabilities. (PAR 42, pg.38-39)

10 **C. Time Schedule Order No.00-131**

11 On October 27, 2000 the RWQCB issued Order No. 00-131, a time schedule order  
12 concerning the District's proposed waste water treatment facility. (PAR 14,15,16) Issuance of  
13 the TSO against the District, and only the District, was completely inappropriate, for it mandated  
14 a wastewater treatment facility to resolve *all* of the discharge violations in the Prohibition Zone,  
15 *not just* those that the District was responsible for (which is less than 5% of the total). Hence,  
16 the District vehemently contends that the RWQCB exceeded its authority by requiring the  
17 District to remedy the discharge violations of other entities. Furthermore, from the outset, the  
18 TSO was doomed to fail, for it imposed unrealistic timelines. In essence, the TSO required  
19 completion of a wastewater treatment plant at the selected Tri-W site by August 30, 2004. (PAR  
20 15) That is 3 years and 10 months to plan, bid, design, conduct environmental review, permit,  
21 and construct a major industrial facility along the coast of central California. It is undisputed  
22 that the deadlines were not met, and it is undisputed that missing the deadlines was beyond the  
23 control of the District. (PAR 24) It is also undisputed that the TSO is moot in light of recently  
24 enacted legislation (see below). In 2000, the District appealed the TSO to the SWRCB, and such  
25 appeal was held in abeyance until January, 2006 when the SWRCB dismissed it without hearing.

26 **D. The Proposed Sewer Treatment Plant At The Tri-W Site**

27 The TSO was the RWQCB's means to achieve compliance with the discharge  
28 prohibitions in the Prohibition Zone by compelling construction of a wastewater treatment plant

1 at a location called the "Tri-W Site," which is right in the center of the Los Osos Community,  
2 adjacent to a community center, churches and residences. As such, according to the  
3 Environmental Impact Report for the proposed project, the Tri-W Site was not the  
4 environmentally preferred location. In addition, the bids for the proposed project were 46%  
5 higher than engineer estimates---a circumstance that would result in the Tri-W project being the  
6 most expensive waste water treatment plant (on a per capita basis) in the country, with monthly  
7 sewer bills estimated to be north of \$250 per month, per residence.

8 Predictably, under such circumstances, the voters revolted. In the Spring of 2005, an  
9 initiative known as Measure B was drafted, and three of the District's Directors who advocated  
10 the super-expensive facility at the Tri-W Site were petitioned for recall. Measure B, in essence,  
11 required that the wastewater treatment plant be re-located to a site approved by the voters.

12 When Measure B and the recall petitions qualified for the ballot, the RWQCB fumed and  
13 injected itself into litigation to invalidate Measure B on the basis that it interfered with the  
14 RWQCB-mandated facility at the Tri-W Site. The RWQCB also threatened massive retaliation  
15 via enforcement action "if the election did not go its way."

16 On September 27, 2005 the election was held. Measure B passed, and all 3 District  
17 Directors subject to recall were voted out of office. The election was certified on September 30,  
18 2005.

19 **E. The ACL Process**

20 **1. The RWQCB Uses The ACL Process To Punish Voters**

21 Immediately upon learning of the election results, RWQCB Executive Roger W. Briggs  
22 went into action. Although Mr. Briggs adamantly insisted under oath before his own Board that  
23 the ACL Complaint was motivated by the District's October 6, 2005 suspension of work on the  
24 Tri-W Site, on cross examination Mr. Briggs was confronted with a September 28 email he had  
25 written that was to the contrary: "I've already received and reviewed a draft ACL Complaint, so  
26 we are rolling. I'm shooting for getting an ACL to the District next week, even before the new  
27 b[oar]d can meet. I want them to understand what they will be stepping into before they vote on  
28 any motion to delay" (PAR 43, pgs. 247-253). In other words, because the election did not go

1 way” the RWQCB was going to use its enforcement power to punish the voters, despite the fact  
2 that the new District Board had no discretion to continue with the Tri-W project, for the newly  
3 enacted Measure B required that the construction contracts at the Tri-W Site be terminated  
4 immediately under their own terms. Simply put, Mr. Brigg’s email threatened enforcement  
5 action if the District followed the law and implied that no enforcement action would be taken if  
6 the District broke the law.

7 So on October 6, 2005, the RWQCB serves the ACL Complaint, setting hearing for  
8 December 1, 2005---less than 2 months from date of service. In his transmittal letter, Mr. Briggs  
9 makes it very clear that the ACL is intended to force construction of the Tri-W Site:

10 “If completion of the wastewater project proceeds immediately, I am prepared to  
11 recommend that the Water Board apply the assessed amounts to project costs. However,  
12 such recommendation would be contingent upon the CSD taking all necessary actions to  
13 support completion of the wastewater project, including (but not limited to) continuing to  
14 defend against appeal of the recent Superior Court ruling invalidating the facility location  
15 initiative...

16 We also intend to begin enforcement proceedings against individual dischargers; that is,  
17 individual property owners with septic system discharges in violation of the Basin Plan  
18 prohibition. This action will also be additional cost to the community that you could  
19 avoid by choosing to [violate the law and] comply rather than intentionally [following the  
20 law and] violating the prohibition and the Water Code, and intentionally continuing  
21 extended pollution.”

## 2. The ACL Briefing And Hearing Process

22 The District had until October 31, 2005 to respond to the ACL Complaint. After  
23 requesting a continuance, the District had until November 17, 2005 to submit its briefs and  
24 documents for the administrative record. In its briefings, the District requested another  
25 continuance---based both on inadequate time to prepare and the District’s desire to retain  
26 specialty counsel to assist it in defending against the ACL Complaint. The request was denied  
27 without reason.

28 The agenda for the hearing stated, inter alia, that:

“I. “All Board files, exhibits, and agenda material pertaining to items on this agenda are  
hereby part of the record.”

A copy of the agenda notice is attached hereto as Exhibit B.

However, on opening the hearing on December 1, 2005, Chairman Jeffrey Young stated

1 that such documents would be excluded from evidence (PAR 41, pg. 21).

2 On December 2, 2005, after all of the evidence was taken, Chairman Young emphatically  
3 and repeatedly stated that there would be no more taking of evidence, and the parties were to  
4 prepare for closing arguments (PAR 42, pgs. 246 and 306). Yet, subsequent missives from the  
5 Chair directed that more evidence and more briefings be produced by December 22, 2005 (PAR  
6 32 and 33). The Chair even issued a subpoena for further evidence a mere three business days  
7 before the “closing argument date” of January 5, 2006 (PAR 43, pg.1 *et seq.*) When hearing  
8 resumed on January 5, 2006, Chairman Young, over the repeated objection of the District, re-  
9 opened the taking of evidence (PAR 43, pg. 75 *et seq.*).

10 After the close of evidence, after closing arguments, and immediately before the  
11 RWQCB adjourned into deliberations on the ACL Complaint, RWQCB counsel Lori Okun  
12 dropped a “poison pill” by informing the RWQCB that, unbeknownst to RWQCB members, the  
13 RWQCB “had just” filed suit against the District in Superior Court to invalidate Measure B  
14 (PAR 43, pg.262). Such announcement was not necessary at that time, and Ms. Okun admits  
15 that doing so certainly raised bias concerns. Thus, prior to the RWQCB deliberating on the ACL  
16 Complaint, the RWQCB’s Executive Officer had already pre-determined the RWQCB’s position  
17 on the District’s Measure B defense to the ACL Complaint.

18 Sometime around 9 pm on January 5, 2006, the RWQCB rendered its decision, and a  
19 written Order was cobbled together that same evening. Such Order is fatally defective for three  
20 primary reasons. First, the amount of the civil liabilities imposed exceed the scope of the ACL  
21 Complaint. The Prosecution Team admitted that the “Complaint does not allege any violations  
22 prior to September, 2002,” (PAR 41, pg.86) but the imposed liability is calculated from October  
23 1, 1999. Second, it is impossible to tell from the Order which findings relate to the TSO  
24 violation and which ones relate to the Basin Plan violation. As such, the evidentiary nexus  
25 between the alleged violation(s) and the imposed penalty is not present. Third, although the  
26 ACL Complaint was drafted in *the alternative*, alleging both TSO and Basin Plan violations, the  
27 Prosecution team chose to prosecute under the TSO violation only (PAR 41, pgs. 73-79).  
28 However, the Order imposes civil liability under *both* the TSO and Basin Plan theories.

Lastly, upon the RWQCB rendering its Order, The Executive Officer stated that enforcement action would be taken against other dischargers in the Prohibition Zone, but that such action would be via Cease and Desist Orders or Cleanup and Abatement Orders, **not** ACL Complaints (PAR 43, pg.415).<sup>4</sup> Such distinction is significant because the two former enforcement options provide for notice and opportunities to cure, while the latter does not.<sup>5</sup> Thus, the District has been “singled out” and treated differently and more harshly than other dischargers of equal or greater culpability (PAR 49).

#### IV.

## ARGUMENT

**A. All Civil Liabilities Imposed Pursuant To The ACL Complaint**  
**Should Be Set Aside**

Many of the procedural and substantive deficiencies in this ACL process pertain to ***both*** the liability imposed for violation of the Basin Plan ***and*** violation of the TSO. These are presented immediately below.

## **1. The District's Due Process Rights Were Violated**

Our Constitution guarantees that that whenever the government prosecutes individuals or entities for alleged violations of law, the accused has a fundamental right to be treated fairly. It has long been held by our Supreme Court that:

“[i]n judging what is due process of law, respect must be had to the cause and object of the taking... , and if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but, if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.”

*Wulzen v. Board of Supervisors* (1894) 101 Cal.15, 18. In this case, the RWQCB, in retaliation against the voters of Los Osos, rushed to judgment minutes after elections results were known. In so doing, the RWQCB committed egregious errors that have denied the District its due process rights as guaranteed by the Constitution.

<sup>4</sup> On or about January 30, 2006, the RWQCB's website showed that hearings on these additional enforcement actions would commence on March 27, 2006. (PAR 49)

<sup>5</sup> Indeed, under the RWQCB's January 30, 2006 posting on its website, the other dischargers receive up to the year 2010 to comply and are allowed to pump out their septic systems in the interim (PAR 49).



1 years the District had retained, Mr. Gary Grimm, a specialist in administrative matters before the  
2 Water Boards, as its counsel on RWQCB and SWRCB issues. Unfortunately, during most of the  
3 two month preparation period, Mr. Grimm was out of the country and unavailable to assist in the  
4 District's defense. Similarly, because of the tremendous amount of work involved in this matter  
5 and because Mr. Seitz and Mr. McClendon are from small firms, the District needed the  
6 resources of a larger firm in order to adequately prepare its defense. Thus, even with an  
7 expedited process to retain special counsel, Burke, Williams & Sorensen, LLP was not retained  
8 until November 17, 2005---after initial briefing and just two weeks before the hearing.

9 The District requested a continuance of the hearing to allow Mr. Grimm and Burke,  
10 Williams & Sorensen, LLP to be retained and have a reasonable opportunity to "get up to speed,"  
11 but the RWQCB denied this request as well. As a result, and again for no good reason, the  
12 District was denied the opportunity to have sufficient legal expertise and resources to mount a  
13 proper defense; accordingly, the District's due process rights were violated and the ACL Order  
14 should be vacated.

15 **c. The District was subject to contradictory rulings by the Chair**

16 Another key aspect of due process, one that falls squarely on the back of the government,  
17 is that it conduct fair proceedings. That did not happen here, for Chairman Jeffrey Young made  
18 a plethora of rulings and then later reversed himself, resulting in an ACL process that had  
19 numerous fits and starts as the District was forced to defend against an ACL Complaint that  
20 continually morphed and a body of evidence that was a moving target.

21 For example, the deadline for submitting documentary evidence was initially October 31,  
22 2005 as set forth in the letter transmitting the ACL Complaint to the District (PAR 26). That  
23 date was modified by Chairman Young to November 17, and then again to November 28 but the  
24 hearing date was not moved accordingly. At the December 1 hearing, Chairman Young  
25 excluded late evidence (PAR 41, pg.19) Then, on December 2, Chairman Young opened up the  
26 taking of evidence again. At the end of the day, Chairman Young emphatically and repeatedly  
27 closed the taking of all evidence and directed counsel to prepare for closing arguments, which  
28 would be given on January 5, 2006 (PAR 42, pgs. 246 and 306). Then, on December 4, the



1 opened the case for the taking of evidence (and further briefing) again (PAR 32). That direction  
2 was modified once more on December 6, 2005 (PAR 33), and yet again on December 16 (PAR  
3 37). Then, just three business days before closing arguments, the Chair issued a subpoena  
4 *deuces tecum* for even more documentary evidence. The District objected to all of this in writing  
5 and via a motion to quash the subpoena, but such objections were overruled (PAR  
6 27,30,35,36,38 and 43, pg.1 *et seq.*) Finally, on January 5, the Chair let in more documents and  
7 testimony, and excluded others---finally getting to closing arguments late in the afternoon.  
8 These inconsistencies made it impossible for the District to conduct a meaningful defense, for  
9 the factual predicate surrounding the ACL Complaint kept changing.

10 Clearly, all of this patchwork and hole-plugging could have been avoided if the RWQCB  
11 had allowed adequate preparation time for the ACL process. Fair and efficient adversarial  
12 proceedings compel adequate time for counsel on both sides to gather, compile, and meet and  
13 confer on evidence. Because the RWQCB was more interested in expediency than fairness, it  
14 (and not the District) should suffer the prejudice incurred. As a result, on this basis alone, the  
15 Order should be vacated.

16 But perhaps the most egregious and prejudicial misstep occurred when the District, at the  
17 very outset of the hearing, inquired as to the scope of the ACL Complaint. The answer from the  
18 Prosecution Team was emphatic: even though the ACL Complaint is drafted in the alternative  
19 (civil liabilities based on *either* violation of the Basin Plan *or* violation of the TSO), “we are  
20 recommending that the Board assess penalties based on the \$10,000 penalty and the Time  
21 Schedule Order *only*.” This was confirmed by the Chair (PAR 41, pgs 73-76).

22 Given such narrowed scope of the ACL Complaint, the focus of both the prosecution and  
23 the defense was on the TSO. So imagine the surprise when the RWQCB’s decision was to  
24 impose over \$6.5 million in liability on the Basin Plan violation (which was not pursued by the  
25 prosecution) and only \$60,000 on the TSO violation (which is what everyone stipulated to as  
26 being the prosecution’s theory)! As a result, the Order should be vacated because it is premised  
27 on a theory that the District was told was not pursued by the Prosecution Team at the ACL  
28 hearing.

1                                   d.     **The RWQCB did not follow its own published rules on**  
2   **admission of evidence**

3           The published notice for this meeting specifically states, *inter alia*, that:

4           “I. All Board files, exhibits, and agenda material pertaining to an items on this agenda  
5           are hereby part of the record.”

6           Relying on this provision, the District requested that the RWQCB’s files related to Los  
7           Osos be incorporated into the record of this matter. On December 1, 2005, the Chair denied such  
8           request (PAR 41,pg.21). Again, when the government sets the rules in an administrative  
9           proceeding, and then precludes the accused from relying on them, the accused has been denied  
10          due process of law. Here, given the magnitude of the instant ACL Complaint and the history of  
11          wastewater management in Los Osos, many “pieces of the puzzle” are not in the administrative  
12          record because the Chair did not follow his own published rules. That limits the evidence the  
13          District can use in support of arguments in its defense before the SWRCB and the courts, if  
14          necessary. Accordingly, the District has been prejudiced by the RWQCB not following its own  
15          published rules. As such, the Order should be vacated.

16                                   e.     **Immediately prior to commencing deliberations, RWQCB**  
17   **members were informed that the RWQCB had filed suit**  
18   **against the District**

19          Immediately before the RWQCB members adjourned to deliberate the ACL Complaint,  
20          Lori Okun, counsel for the Prosecution Team, announced to the Board that the RWQCB had  
21          “just filed” a lawsuit against the District challenging Measure B. The RWQCB board members  
22          supposedly had no idea that this had been done (PAR 43, pgs. 262-263). Nevertheless, such  
23          announcement poisoned any hope of objectivity by the RWQCB board members, for the  
24          RWQCB was now “on record” as an advocate against one of the District’s defenses: namely, that  
25          the District is required to comply with Measure B because it is the law of the land. Put another  
26          way, it is impossible to be objective in deciding an administrative action when you have already  
27          taken a position in court against the defenses raised by the accused. Therefore, because the  
28          outcome of the hearing was largely pre-determined, by definition it could not have been fair.

1 Thus, the District's due process rights were violated and the ACL Complaint should be vacated.

2           **2. Use Of The ACL Process In An Attempt To Compel Construction Of**  
3           **A Wastewater Treatment Facility At The Tri-W Site Violates Water**  
4           **Code Section 13360**

5 Water Code Section 13360(a) states, in relevant part, that:

6 "No waste discharge requirement or other order of a regional board or the state board or  
7 decree of a court issued under this division shall specify the design, location, type of  
8 construction, or particular manner in which compliance may be had with that  
9 requirement, order, or decree, and the person ordered shall be permitted to comply with  
10 the order in any lawful manner."

11 In this case, it is very clear that the RWQCB is using this ACL process to compel  
12 construction of a wastewater treatment facility at the Tri-W Site. Here is the evidence:

13           \* At the outset of the Prosecution Team's case, Matt Thompson announces:

14           "The proposed Administrative Liability is intended to **COMPEL** the District to complete  
15 the Community Wastewater Treatment Project..." (PAR 41, pg. 81, emphasis added)

16           \* And Mr. Thompson repeats that:

17           "[t]he primary purpose of the Administrative Civil Liability Complaint is to assure that  
18 the District resumes construction of the Wastewater Project." (PAR 41, pg. 91)

19           \* The instant enforcement action was brought only after Measure B took the Tri-W  
20 Site "off of the table."

21           \* Roger Briggs, RWQCB Executive Officer, and Lori Okun, RWQCB counsel,  
22 gave sworn statements in superior court that the RWQCB was mandating a facility at Tri-  
23 W. See Exhibit C attached hereto.

24           \* The transmittal letter for the ACL Complaint states that IF the District returns to  
25 the Tri-W project, then any ACL imposed will be absorbed as "project costs." (PAR 26)

26           \* Mr. Briggs and his staff have refused to discuss, plan for or comment on a  
27 wastewater treatment plant at **ANY** location **other than** Tri-W.

28           \* The amount of civil liability imposed greatly exceeds the District's ability to pay,  
which means that the ACL process is being used to motivate District compliance with the  
Basin Plan and TSO **only** by resuming work at Tri-W.

\* The Cease and Desist Orders for the three District facilities contain mandates to

1 commence and complete construction of a community sewer system. (PAR 9,10,11)

2 The Water Code Section 13360 prohibition is not limited to direct, express orders---for,  
3 according to our Supreme Court, “[t]he power vested by the statute is indeed perverted when the  
4 department utilizes its tools to do indirectly that which is directly and expressly prohibited.”  
5 *Walsh v. Kirby*, (1974) 13 Cal.3d 95, 104; *Taylor v. Spear*, (1925) 196 Cal.709, 717.

6 As a result, it is a manifest violation of due process for the RWQCB to attempt to  
7 indirectly compel construction of a facility at Tri-W by use of the ACL process when it is  
8 statutorily prohibited from doing so directly.

9 **3. Use Of The ACL Process Here Is Discriminatory**

10 It is undisputed that the District discharges at three different locations within the  
11 Prohibition Zone, and it is undisputed that there are other entities that also discharge within the  
12 Prohibition Zone. The RWQCB has chosen to prosecute the District via an ACL Complaint---  
13 where there is no notice and no opportunity to cure the alleged violation. However, all *other*  
14 *dischargers* within the Prohibition Zone are being prosecuted pursuant to Cease and Desist  
15 Orders--- with notice, an opportunity to cure until the year 2010, and the opportunity to pump out  
16 their septic systems (PAR 49). Water Board policy is to use Cease and Desist Orders, not ACL  
17 Complaints, to correct Basin Plan violations, and there is no evidence in the record that justifies  
18 the RWQCB departing from such procedure and “singling out” the District from other  
19 dischargers. It is a denial of due process (i.e. discrimination) to give other dischargers, some  
20 more egregious than the District, a four year opportunity to cure period and not allow the District  
21 the same opportunity. The District should be treated the same as others who discharge the same  
22 type and volume of waste. Because the District is prejudiced in not having the four year cure  
23 period afforded to other similar dischargers, the Order is discriminatory and, therefore, violative  
24 of due process. As such, it should be vacated.

25 **4. The Order Is Vague And Confusing As To Which Findings Apply To**  
26 **The TSO And Which Findings Apply To The Basin Plan**

27 The very purpose of “findings” is to show that a decision is supported by evidence and  
28 application of the proper law. A finding not supported by evidence is, by definition, arbitrary.

1 Similarly, a decision not supported by findings is capricious. Again, citing our Supreme Court:  
2 “When, as here, a governmental entity vested with broad administrative powers acts in an  
3 arbitrary manner so as to affect capriciously the property or property rights of persons subjected  
4 to its administrative controls it has denied to those persons due process of law. *Walsh v. Kirby*,  
5 *supra*, at 105-106.

6 Here, although the Order does contain findings, it is impossible to tell which findings  
7 pertain to the liability imposed for the Basin Plan violation, and which pertain to the TSO  
8 violation. Absent clarity in this regard, the findings are meaningless, thereby rendering the  
9 imposed liabilities capricious.

10 **B. The Civil Liabilities Imposed For Alleged Violations Of The Basin Plan**  
11 **Prohibition Should Be Set Aside**

12 Below are arguments specific to the Basin Plan violations.

13 **1. Findings In The Order Are Not Supported By The Evidence**

14 **a. The commencement date for calculation of liability is arbitrary**

15 The Order states that the \$1,000 per day civil liability for each of the three discharge  
16 locations began accruing on October 1, 1999; however, in defining the scope of the ACL  
17 Complaint at the outset, Michael Thompson of the Prosecution Team stated that “[t]he  
18 Complaint does not allege any violations prior to September 2002.” This was confirmed by  
19 Chairman Young. (PAR 41, pg.86 *et seq.*)

20 As such, picking “October 1, 1999” out of thin air as the date for commencement of  
21 penalty accrual is arbitrary. The Prosecution Team drafted the ACL Complaint and defined its  
22 scope; therefore, the earliest date for commencement of the penalty should be September 1,  
23 2002.

24 **b. The Amount of liability imposed violates Water Code Section**  
25 **13327**

26 **(1) Ability to pay**

27 Section 13327 of the Water Code states that several factors must be considered by the

28 ///

1 RWQCB in assessing civil liability. These include, but are not limited to, the discharger's ability  
2 to pay.

3 In addition, SWRCB Enforcement Policy Section VIIH states, in relevant part:

4 "The ability of a discharger to pay an ACL is limited by its revenues and assets. In most  
5 cases, it is in the public interest for the discharger to continue in business and bring operations  
6 into compliance. If there is strong evidence that an ACL would result in widespread hardship to  
the service population or undue hardship to the discharger, it may be reduced on the grounds of  
ability to pay."

7 "Normally, an ACL should not seriously jeopardize the discharger's ability to continue in  
8 business or operation. The discharger has the burden of demonstrating lack of ability to pay and  
must provide the information needed to support this position."

9 Here there is absolutely *NO* evidence showing that a civil liability of \$6,567,000 for  
10 violation of Water Code Section 13350 is justified. However, to the contrary, there is a plethora  
11 of evidence showing that a \$6,567,000 penalty would punish the District based on the District's  
12 inability to pay such penalty.

13 PAR 8, which is undisputed, sets forth the estimated reserve balance at the end of FY 05-  
14 06 for each of the District's three discharge facilities. The Fire Department will end up with  
15 \$669,002. Bayridge Estates will end up with 31,624, and Vista de Oro will end up with \$19,720.  
16 As stated above, each of these zones of benefit is based on fees-for-services, so there is no  
17 general fund or other source to pay a civil penalty. In addition, the District is legally precluded  
18 from taking funds from one zone of benefit and using them to pay the debts of another, and the  
19 parties agree that the SRF loan proceeds cannot be used to pay civil liabilities. As to the real  
20 property owned by the District, the undisputed evidence shows that such property was purchased  
21 with grant and assessment district funds, which cannot be used for other purposes---such as  
22 paying civil penalties (PAR 43, pgs. 208-209). All of this was explained to the RWQCB in  
23 detail by John Seitz and Bruce Buel, and covered again in closing argument. (PAR 41, pg. 223 *et*  
24 *seq.*; 42, pgs. 7-20; 43, pg. 359 *et seq.*)

25 Because the imposed liability far, far exceeds the District's ability to pay, it must be  
26 regarded as punitive. Coupled with the fact that the ACL Complaint came immediately after the  
27 election of September 27, 2005, it is clear that the RWQCB is using its power as a governmental  
28 entity to punish people for voting against the RWQCB's wishes.

1 (2) **Other Water Code Section 13327 Factors**

2 Water Code Section 13327 does not just permit, *but mandates*, that “whether the  
3 discharge is susceptible to cleanup or abatement,” “degree of toxicity of the discharge” and  
4 “degree of culpability” be taken into account in assessing civil liability. The SWRCB’s own  
5 Enforcement Policy IIC states, in relevant part, that “[f]ormal enforcement orders should contain  
6 findings of fact and establish all the statutory requirements of the specific statutory provision  
7 being utilized.”

8 The Water Code and Enforcement Policy were not followed in this case. Paragraph 15 of  
9 the Order sets forth all of the “Section 13327 factors” *actually considered* by the RWQCB in its  
10 decision. Conspicuous by their absence is any discussion of the “susceptibility,” “toxicity,” or  
11 “culpability” factors; accordingly, the District did not receive due consideration of issues such as  
12 “given that there is no community wastewater treatment facility or sewer, what other waste  
13 management options does the District have to abate the current discharges?”...and “how toxic is  
14 the discharge from the District’s three on-site waste management facilities?”...and “how  
15 culpable is the District, which inherited these three facilities from the County, and in 2000  
16 proposed a plan that would have provided sewer service to the Fire Department, Bayridge  
17 Estates, and Vista de Oro (a Plan rejected by the RWQCB because it did not provide a solution  
18 for the entire Prohibition Zone) (PAR 43, pg.214 et seq.)?”

19 The failure of the RWQCB to follow the law is an abuse of discretion. “Shall take into  
20 consideration” is statutorily mandated, not discretionarily optional. As such, the Order should be  
21 vacated and the ACL Complaint dismissed.

22 **2. The Order Violates The SWRCB Enforcement Policy Against**  
23 **Discrimination**

24 The SWRCB has established enforcement policies to provide statewide consistency  
25 among the regional boards in enforcement of water quality laws. Such policies were not followed  
26 here; accordingly, the RWQCB abused its discretion and the Order should be vacated.

27 Enforcement Policy IA states, in relevant part: “Whenever the circumstances of a  
28 discharge are similar, the provisions of the enforceable orders should be comparable.”

1 The three District facilities at issue were, at one time, subject to Cease and Desist Orders,  
2 but the Prosecution Team stated that “prior Cease and Desist Orders are not at issue.” (PAR 43,  
3 pg.77) Thus, as to the Basin Plan violation, the RWQCB “started from scratch” on its  
4 enforcement efforts. But, in so doing, the RWQCB violated SWRCB Enforcement Policy  
5 Section IV B(2) by not giving notice to the District of the Basin Plan violation; violated Section  
6 IV C(2) by not giving the District notice and an opportunity to cure the violation, and violated  
7 Section IV C (4) by not issuing clean up and abatement orders or time schedule orders to remedy  
8 the problem. Instead, the RWQCB abandoned the prior Cease and Desist Orders and  
9 immediately jumped to the ACL Complaint. It is patently unfair for the RWQCB to impose  
10 massive ACL on the District while concurrently giving every other similarly situated discharger  
11 in the Prohibition Zone until the year 2010 to cease discharging.

12 Accordingly, it is squarely within the responsibility of the SWRCB to ensure that its  
13 Enforcement Policies are applied fairly and consistently both among the regional boards and  
14 within each regional board itself. Thus, the Order here should be vacated, and direction given to  
15 the RWQCB to dismiss the ACL and ensure that future enforcement action is consistent with  
16 SWRCB policy.

17 **C. The Civil Liabilities Imposed For Alleged Violations Of The Time Schedule**  
18 **Order Should Be Set Aside**

19 Below are arguments specific to the TSO violation.

20 **1. The District Cannot Be Held Liable For All Of The Dischargers**  
21 **Within The Prohibition Zone**

22 The TSO relates to construction of a wastewater treatment facility. The purpose of the  
23 wastewater treatment facility is to eliminate all of the discharges in the Prohibition Zone.  
24 However, the RWQCB has no jurisdiction to mandate that the District cure all of the discharge  
25 violations in the Prohibition Zone. The District is only responsible for curing its own discharge  
26 violations. Thus, it is beyond the RWQCB’s authority to (1) issue a TSO forcing the District to  
27 remedy other entities’ discharge violations, and (2) penalize the District for missing the deadlines

28 ///



1 set forth in that *ultra vires* TSO. Therefore, the civil liability for violation of the TSO should be  
2 vacated.

3                   **2. The Findings Are Not Supported By The Evidence In The Record**

4                   **a. The amount of liability imposed violates Water Code Section**  
5                   **13308**

6                   The civil liability imposed for violation of the TSO is separate and distinct from that  
7 imposed pursuant to the Basin Plan violation. Under the Order, the District is assessed a \$60,000  
8 penalty---\$10,000 per day from October 1, 2005 to October 6, 2005. However, such sum is still  
9 violative of the Water Code Section 13308 provision that states that any civil penalty shall be  
10 based on an amount reasonably necessary to achieve compliance---and may not include any  
11 amount intended to punish or redress previous violations.

12                   **(1) Ability to pay**

13                   As set forth above, the TSO applies to the entire District, yet District funds are segregated  
14 into accounts based on distinct zones of benefit. So the question is: where does the \$60,000 to  
15 pay the penalty come from? Throughout the ACL process the District painstakingly went  
16 through its finances and advised the RWQCB in many different ways that the zones of benefit  
17 are not geographically synonymous with the Prohibition Zone, and that it is illegal to hold the  
18 District responsible for curing all District and non-District discharge violations in the Prohibition  
19 Zone. So, because all of the District's funds are earmarked for, and exclusive to, each zone of  
20 benefit, there are no funds to respond to a "Prohibition Zone-wide" civil penalty. As a result, the  
21 \$60,000 in civil liability must be deemed punitive because the District has no way to pay it. As  
22 stated in the RWQCB's own July 2004 Staff Report, presented by Executive Officer Roger  
23 Briggs, "[a]ssessment of penalties under Order 00-131 would result in bankrupting the CSD and  
24 the responsibility for the community wastewater project would likely revert to San Luis Obispo  
25 County." (PAR 24) Now that he is Prosecution Team Leader, Mr. Briggs has apparently  
26 switched positions---however, his flip-flop rings hollow, for the Prosecution Team offers no  
27 evidence in support of its position that a \$60,000 penalty is not punitive.

28 ///

1 (2) **Achieving Compliance**

2 That same July 2004 Staff Report (presented by the same Roger Briggs) also states: “[An  
3 ACL] action is not likely to result in resolution of water quality problems in Los Osos in a timely  
4 manner.” Thus, RWQCB staff admits that an ACL penalty fails to pass muster under Water  
5 Code Section 13308. However, after losing the election, Prosecution Team Leader Roger Briggs  
6 switches positions again, asserting before the RWQCB that a \$60,000 penalty will, indeed,  
7 achieve compliance—but Mr. Briggs offers no evidence in support of his contention.

8 **b. Impossibility of compliance**

9 The Order finds that the District did not comply with the TSO for six days---October 1-  
10 October 6, 2005. Such finding must fail because on October 1, 2005 it was impossible for the  
11 District to be in compliance with the TSO, and the Prosecution Team admits that compliance was  
12 impossible (PAR 43, pg.256). This is true for several reasons, all of which were beyond the  
13 control of the District. First, compliance was impossible after September 2002 due to discharge  
14 permit issues (PAR 43, pg.257). Second, the TSO was based on SRF funding timelines, which  
15 were not met by the SWRCB (PAR 42, pgs.17-18). Third, construction was to be completed by  
16 August 30, 2004, but the District requested reconsideration of the TSO deadlines so they could  
17 be more realistic. Executive Officer Briggs denied such request. However, Mr. Briggs did  
18 acknowledge that “[p]roject delays, and noncompliance with the Time Schedule Order, are  
19 clearly beyond Los Osos CSD’s ability to control.” (PAR 24)

20 As a result, if on October 1, 2005 it was impossible for the District to be in compliance  
21 with the TSO, and such impossibility was beyond the control of the District, it is patently unjust  
22 to impose civil liabilities against the District for missing the TSO deadlines for those six days.  
23 Accordingly, the \$60,000 civil penalty for violation of the TSO as set forth in the Order must be  
24 vacated.

25 ///

26 ///

27 ///

28 ///

V.

CONCLUSION

In sum, the SWRCB, as the appellate authority for review of regional board actions, needs to take a hard look at this particular ACL process and the motivations behind it. In so doing, the SWRCB will come to the inescapable conclusion that the RWQCB's action here is *not*, in any way, shape or form, designed to improve water quality. The RWQCB and its staff have refused to participate in working towards any solution other than a treatment plant at the Tri-W site---even though Tri-W is in the process of being sold. With Tri-W off the table and the RWQCB unwilling to consider any other solution, this RWQCB has ensured that water quality will continue to degrade.

The District trusts that the SWRCB will act to reign in rogue decisions by a rogue regional board and chart a course that will actually improve water quality.

DATED: February 6, 2006 , BURKE, WILLIAMS & SORENSEN, LLP

By: 

STEPHEN R. ONSTOT  
Attorneys for Los Osos Community Services  
District

## BACKGROUND

### 1983 to Date of ACL Complaint

During the years 1983 and 1984, both the Central Coast Regional Water Quality Control Board ("RWQCB") and the State Water Resource Control Board ("SWRCB") adopted resolutions amending the Water Quality Control Plan for the Central Coast Region (Basin Plan) to prohibit discharges from individual and community sewage disposal systems within the Los Osos/Baywood Park area known as the Prohibition Zone, effective November 1, 1988 (PAR #1 and 2). The Prohibition Zone is depicted in PAR #5, which further defines developed and undeveloped parcels within the Prohibition Zone. From and after 1988 through 1999, the RWQCB attempted to delegate the responsibility for bringing the property owners within the Prohibition Zone into compliance with the prohibition to the County of San Luis Obispo (the history of the County's involvement is summarized in PAR #13, see Background).

In the fall of 1998 the voters approved Measure K-98 (PAR #4) that formed the Los Osos Community Services District. K-98 transferred various zones of benefit operated by County Service Area No. 9 to the Los Osos Community Services District. The zones transferred included Bayridge Estates – Zone "F", Vista Del Oro – Zone "E" and the Fire Department – Zone "B" (see PAR #5 for a depiction of various zones transferred to the District). Pursuant to legislative enactments, each zone operates independently with separate budget and funding mechanisms (see Government Code §§ 61144 and PAR #8, the District's Consolidated Fund Summary – depicting the various zones). (For further testimony see PAR #42 pgs. 7 through 15).

Bayridge Estates, Zone "F", it is comprised of approximately 140 residential units. The District provides drainage, street lighting, open space maintenance as well as the operation and maintenance of a community septic system previously operated by the County.

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1 Vista Del Oro, Zone "E ", it is comprised of approximately 60 residential units.  
2 The District provides drainage, street lighting as well as the operation and maintenance  
3 of a community septic system that was previously operated by the County.

4 The District operates a small individual septic tank that provides sewer service to  
5 the Fire Department, Zone "B" (that provides fire and emergency response services  
6 throughout the community).

7 A depiction of the Prohibition Zone that is included within the District boundary is  
8 shown on PAR #45.

9 Shortly after the District was formed, the RWQCB issued Cease and Desist  
10 Orders for the District's septic tank operations for the Vista Del Oro Zone, the Bayridge  
11 Zone and the Fire Department Zone for discharging waste in violation of the prohibition  
12 (PAR #9, 10 and 11). Each of these Cease and Desist Orders included a time schedule  
13 for compliance.

14 It is uncontested that the District timely submitted a Wastewater Facility Project  
15 Report in compliance with the time schedules ordered in Cease and Desist Orders  
16 (PAR #12 and 13). However, the RWQCB determined that although the Wastewater  
17 Facility Project Report would address the various zones operated by the District into  
18 compliance and compliance with RWQCB 83-13, the plan would not have addressed  
19 the entire Prohibition Zone (PAR #12 and 13).

20 The RWQCB then sought to establish a Time Schedule Order (TSO 00-131) that  
21 would impose on the District a time schedule that would address the entire Prohibition  
22 Zone and not just the discharges operated by the District within identified zones (PAR #  
23 14-15). Contrary to various statements offered by the RWQCB Prosecution Team, the  
24 LOCSD objected to the imposition of the TSO 00-131 (PAR#16 and the District's filing  
25 of a request to hold a petition challenging TSO 00-131 in abeyance). However, it is  
26 undisputed that the time schedule adopted by TSO 00-131 was based on the District's  
27 negotiation with the SWRCB to transfer and extend the SRF loan from the County to the  
28 District (PAR #42 at pgs. 17 and 18).

1 In February, 2003, the RWQCB considered the adoption of Waste Discharge  
2 Requirements for the Project (PAR #18). The District's comment letter included a  
3 request to extend the time schedule for TSO 00-131 due to circumstances beyond the  
4 control of the District (PAR #17 paragraph 5). The RWQCB Staff Report acknowledged  
5 the District was not in compliance with TSO 00-131 and that the RWQCB Board would  
6 make a determination on the time schedule order compliance at a future date (PAR #18  
7 paragraph 1 under comments).

8 On February 7, 2003, the SWRCB, based on consultation with the RWQCB,  
9 agreed to extend the SRF timeline that provided the model for TSO 00-131 (PAR #19).

10 Despite the RWQCB's acknowledgement that the SRF loan timeline was  
11 extended and that future compliance with TSO 00-131 was impossible, the RWQCB did  
12 not modify the time schedule but instead took the position that the RWQCB would not  
13 enforce TSO 00-131 as long as the RWQCB concluded the District was "proceeding  
14 with the Project", thus making the District's compliance illusory with the threat of  
15 enforcement based on subjective determinations that are clearly outside the parameters  
16 of establishing TSO's (see PAR #20, 21, 22, 23, and 24).

17 Finally, in July, 2004, the RWQCB acknowledged that enforcement of TSO 00-  
18 131 under the strategy outlined above would result in bankrupting the District (PAR #24,  
19 enforcement options against the LOCSD).

20 During the fall of 2005, the District pursuant to the Elections Code held a recall  
21 election in which three (3) members of the Board were recalled and Measure B was  
22 adopted, with the District suspending the construction contracts pursuant to Contract  
23 documents.

24 On or about October 6, 2005, the RWQCB Staff issued the ACL complaint (PAR  
25 #25 and 26) which, among other things, for the first time placed the District on notice  
26 that the RWQCB Staff would, in addition to TSO violations, seek penalties based on the  
27 general prohibition for prohibition violations of the Bayridge Estates (Zone "F"), Vista Del  
28 Oro (Zone "E") and the Fire Department (Zone "B").

CENTRAL COAST WATER BOARD  
Central Coast Water Board Meeting Agenda

8  
December 1-2, 2005

**CONDUCT OF MEETING AND HEARING PROCEDURES**

- A - The primary duty of the Central Coast Water Board is to protect the quality of waters within the Region for all beneficial uses. This duty is implemented by formulating and adopting water quality plans for specific ground or surface water basins and by prescribing and enforcing requirements on all domestic, municipal, and industrial waste discharges. Specific responsibilities and procedures of the Regional Water Quality Control Boards and the State Water Resources Control Board are outlined in the Porter-Cologne Water Quality Act (Division 7), California Water Code.
- B - The purpose of the meeting is for the Board to obtain testimony and information from staff and concerned and affected parties and make decisions after considering the recommendations made by the Executive Officer. The Board will vote only on matters listed on the agenda. The Board may give direction to the Executive Officer on any matter discussed during the meeting.
- C - Agenda items are numbered for identification purposes and will not necessarily be considered in the order listed.
- D - **RULES FOR LATE SUBMISSION OF WRITTEN MATERIALS:** This paragraph applies only if there are no deadlines for written testimony or comments in a separate hearing notice for an item. Written material received after the due date on the first page of the agenda and before noon on the Monday of board meeting week generally will not be provided to Board members until the day of the meeting, but will become part of the record unless the Chair rules that the late submission would prejudice the Central Coast Water Board staff or any party. Written material received after noon on the Monday of board meeting week will not be provided to Board members or become part of the record, unless the Chair rules that exclusion would create a severe hardship and that no party (including Central Coast Water Board staff) will be prejudiced by the late submission. The Chair will rule at or before the hearing. Late submissions that consist of evidence (as opposed to policy statements or comments) will generally be deemed prejudicial unless all designated parties (see below) have time to consider the evidence before the meeting.
- E - The Board and staff welcome information on pertinent problems, but comments at the meeting should be brief and directed to specifics of the case to enable the Board to take the appropriate action. Whenever possible, lengthy testimony should be presented to the Board in writing and only a summary of pertinent points presented verbally. In order to give everyone an opportunity to be heard, comments should have been previously submitted in writing and a time limit on presentations may be imposed on any agenda item. Speakers should plan to summarize key points within three minutes. Please notify staff three weeks prior to meetings of a request for presentations planned for longer than three minutes, for scheduling purposes. The Chair will decide if the request should be granted.
- F - Material presented to the Board, as part of testimony (e.g., photographs, slides, charts, diagrams, etc.) that is to be made part of the record must be left with Executive Assistant, Carol Hewitt. Photographs or slides of large exhibits are acceptable. If you plan to use visual aids such as PowerPoint, contact the Central Coast Water Board staff prior to the meeting to arrange for equipment set-up.
- G - **HEARING RULES FOR CONTESTED HEARINGS ON WASTE DISCHARGE OR WATER RECYCLING REQUIREMENTS, NPDES PERMITS, ADMINISTRATIVE CIVIL LIABILITY ORDERS AND INVESTIGATION OR ENFORCEMENT ORDERS [CWC §§ 13267, 13300-13308, 13383]:** This paragraph applies unless there are different requirements in a hearing notice for an item. Only designated parties will have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses; to impeach any witness; and to rebut the evidence against him or her. Designated parties are any persons named in the proposed order. Central Coast Water Board staff is a designated party for administrative civil liability complaints, and for cease and desist orders that establish monetary liability and that are not issued concurrently with waste discharge requirements. All other persons wishing to testify or provide comments are interested persons and not designated parties. Such interested persons may request status as a designated party for purposes of an item by submitting such request in writing to the Central Coast Water Board no later than two weeks after the draft order is available for public comment. The request must explain the basis for status as a designated party and in particular how the person is directly affected by the discharge.
- H - The Board Chair may specify a time limit for oral presentations and testimony. Board members may interrupt a presentation with questions or comments. The time for Board member questions and witnesses' answers will not count toward the time limit for a presentation.
- I - All Board files, exhibits, and agenda material pertaining to items on this agenda are hereby part of the record.
- J - Any person affected adversely by a certain decision of the California Regional Water Quality Control Board, Central Coast Region (Central Coast Water Board), may petition the State Water Resources Control Board (State Board) according to Water Code section 13320 and Title 23 California Code of Regulation section 2050. The Petition should be addressed to Office of Chief Counsel and must be filed within 30 days of the Executive Officer's or the Board's action or failure to act. The State Board must receive the petition within 30 days of the Central Coast Water Board's meeting at which the action was taken. Copies of the law and regulations applicable to filing petitions will be provided upon request.
- K - A copy of the procedures governing Regional Water Quality Control Board meetings may be found at Title 23, California Code of Regulations, Section 647 et seq., and is available upon request. Hearings before the Central Coast Water Board are conducted pursuant to Government Code sections 11400 et seq. but not Government Code sections 11500 et seq. The Chair may waive any procedural statutes or regulations that are not required by the U.S. or California Constitutions.
- L - The facility is accessible to people with disabilities. Individuals who require special accommodations are requested to contact John Goni (805/542-4728) at least five working days prior to the meeting. TTY users may contact the California Relay Service at 1-800-735-2929 or voice line at 1-800-735-2922.
- M - All persons who actively support or oppose the adoption of waste discharge requirements or an NPDES permit pending before the Central Coast Water Board must submit a statement to the Board disclosing any contributions of \$100 or more to be used in a federal, state, or local election, made by the action supporter or opponent, or his or her agent within the last 12 months to any Central Coast Water Board Member.
- N - All permit applicants or persons who actively support or oppose adoption of a set of waste discharge requirements or an NPDES permit pending before the Central Coast Water Board, are prohibited from making a contribution of \$100 (or more) to any Board Member for three months following a Central Coast Water Board decision on the permit application.

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10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF SAN LUIS OBISPO

12 LOS OSOS COMMUNITY SERVICES  
13 DISTRICT,

14 Plaintiff and Petitioner,

15 v.

16 JULIE RODEWALD, County Clerk-Recorder and  
17 DOES 1 through 5000 inclusive,

18 Defendants and Respondents.

19 CITIZENS FOR A SAFE AND AFFORDABLE  
20 ENVIRONMENT, AL BARROW, GWEN  
21 HENRY, MARCIA MUNSON, ROBERT  
22 STARK, and other proponents and signatories of  
23 the Initiative petition,

24 Real Party in Interest.

NO.

DECLARATION OF LORI T. OKUN IN  
SUPPORT OF ALTERNATIVE WRIT

Date: June 21, 2005

Time: 1:30 p.m.

Dept.: Veterans Memorial Building,  
100 Grand Ave.

Judge: Douglas G. Hilton

25 I, Lori T. Okun, declare as follows:

26 1. I am a Senior Staff Counsel at the State Water Resources Control Board, Office of Chief  
27 Counsel. I have worked for the State Water Resources Control Board since June 2001 and have  
28

Declaration of Lori T. Okun

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6/17/05



1 practiced law in California since 1988. I am counsel to the Central Coast Regional Water Quality  
2 Control Board (Central Coast Water Board, or Water Board).

3 2. The Water Board is the State of California agency with primary jurisdiction over water  
4 quality in the Central Coast region.

5  
6 3. I am informed and believed that the Water Board first addressed pollution resulting from  
7 septic system discharges in 1971, when it adopted its Interim Basin Plan. In 1983, the Water Board  
8 adopted Resolution 83-13, amending the Basin Plan to prohibit discharges from septic systems in a  
9 Prohibition Zone within Los Osos and Baywood Park based on a decade of studies of the water quality  
10 problems that septic systems within that Prohibition Zone were causing. The prohibition took effect in  
11 1988, to allow a reasonable amount of time for project construction, but illegal use of septic systems  
12 continues to this day because no waste treatment plant has ever been available to businesses and  
13 residences within the Prohibition Zone. The Water Board has actively sought to end septic system  
14 discharges within the Prohibition Zone since before I began representing the Water Board.  
15

16  
17 4. The Water Board issued Time Schedule Order (TSO) No. 00-131 to Petitioner Los Osos  
18 Community Services District (District) in 2000. TSO No. 00-131 established a time schedule to bring  
19 the District into compliance with four 1999 Cease and Desist Orders that required the District to cease  
20 its discharges to septic systems serving Bayridge Estates, the Vista de Oro subdivision and two District  
21 facilities (CDOs Nos. 99-53 through 99-56). The TSO requires the District to commence construction of  
22 a community sewer system by September 6, 2002, and to complete construction of the community sewer  
23 system by August 30, 2004. The District is almost three years in arrears of the construction  
24 commencement date. Although Water Board staff has advised the District that staff does not intend to  
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1 recommend enforcement of the TSO's \$10,000 per day penalty if delays are beyond the District's  
2 control, the TSO schedule has never been revised and remains fully enforceable.

3 5. I am informed and believe that the current plant location has been part of the District's  
4 wastewater treatment plant project since the project's inception. In 2003, the Water Board issued waste  
5 discharge/recycled water requirements (WDRs), which authorize discharges from the selected treatment  
6 plant project. (Water Board Order No. R3-2003-0007.) The only person or entity that challenged the  
7 WDRs was California Cities Water Company. California Cities claimed, among other things, that the  
8 WDRs would not adequately protect groundwater quality. The Water Board prevailed in that case. (San  
9 Luis Obispo Superior Ct. Case No. CV 030735.)  
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11

12 6. The State Water Resources Control Board (State Water Board) extended a low-interest  
13 loan to fund the selected treatment plant project in January 2005. The loan commitment requires the  
14 District to issue a notice to proceed with construction by September 20, 2005, with a possible 90-day  
15 extension for good cause. A true and correct copy of State Water Board Resolution 2005-0016 is  
16 attached to this Declaration as Exhibit A. The stated amount of the loan is \$93 million, but State Water  
17 Board members and/or staff stated at the Resolution hearing that the loan commitment includes a  
18 provision for a 50% overage contingency, for a total potential loan amount of \$139,500,000.  
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21 7. The California Coastal Commission approved an amendment to the local coastal plan that  
22 specifically authorized the treatment plant site in August 2002. The Coastal Commission again  
23 approved the project site when it adopted a site-specific coastal development permit for the project in  
24 August 2004. The Water Board's WDRs and the State Water Board's loan are both based on the current  
25 project and site. All legal challenges to the WDRs and Coastal Commission permit have been resolved  
26 in the District's favor.  
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Declaration of Lori T. Okun

-3-

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1           8.       I attended the January 2005 hearing extending the loan commitment. At the hearing, the  
2 State Water Board explained that the loan funds allocated to the Los Osos project were desperately  
3 needed to fund projects in other communities throughout the state, and that the loan fund did not have  
4 adequate resources to fund other projects that were approved and ready to go. The State Water Board  
5 members were clear that the loan was for the proposed project at the proposed location only, and that any  
6 alternative project would require a new loan application. The new application would be subject to the  
7 same ranking criteria as any other new application, and Los Osos would lose its "place in line" for low-  
8 interest funding. I am informed and believe that the District would be unable to construct any project at  
9 all without the State Water Board loan. Based on statements that Board members made during the  
10 January 2005 hearing, I do not believe the State Water Board will extend the notice-to-proceed dates set  
11 forth in Resolution 2005-0016.  
12

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14           9.       The Porter-Cologne Water Quality Control Act, Water Code sections 13000 et seq.  
15 ("Porter-Cologne") establishes nine regional water quality control boards, including the Central Coast  
16 Water Board, and the State Water Board. When it adopted Porter-Cologne, the Legislature explicitly  
17 stated that water quality is an issue of statewide concern. (Ca. Wat. Code §13000.) The regional water  
18 quality control boards and State Water Board are the State agencies charged with primary responsibility  
19 for the coordination and control of water quality. (Ca. Wat. Code §13001.) The Water Board is the state  
20 agency with primary jurisdiction over water quality throughout California's Central Coast, including all  
21 of San Luis Obispo County. The Water Board is a State agency subject to statewide coordination and  
22 policy that the State Water Board establishes. (Ca. Wat. Code §§13000-13001.) The State Board  
23 actively coordinates water quality policy and places a high priority on statewide consistency in water  
24 quality regulation.  
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Declaration of Lori T. Okun

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1           10.     Even other State agencies are subject to the water boards' primary jurisdiction in  
2 regulating water quality. For example, when the California Coastal Commission issues a coastal  
3 development permit to a wastewater treatment facility, it may not consider or impose conditions on  
4 water quality matters within water board jurisdiction, and cannot impose permit conditions that conflict  
5 with a determination by a regional water quality control board or the State Water Board. (Ca. Pub. Res.  
6 Code, §30412, subd. (b) and (c); see also, *People v. New Penn Mines* (1963) 212 Cal.App.2d 667  
7 (interpreting the Dickey Act, the predecessor to Porter-Cologne, as limiting the water quality jurisdiction  
8 of other state agencies).)  
9

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11           11.     The Initiative would frustrate the legislative act of the Water Board and State Water  
12 Board, which are superior bodies to the District. The Water Board adopted the Prohibition Zone as a  
13 provision of its Water Quality Control Plan, also known as the Basin Plan. All Basin Plan provisions  
14 require approval of the State Water Board. (Ca. Wat. Code §13245.) Basin Plans are quasi-legislative in  
15 nature. The Prohibition Zone is clearly a legislative act of a body superior to the District.  
16

17           12.     The Initiative would frustrate both general state policy regarding water quality and the  
18 specific actions the Water Board and State Water Board have taken to protect water quality in the Los  
19 Osos area.  
20

21           13.     Porter-Cologne includes a limited savings provision that allows local entities to "adopt  
22 and enforce additional regulations, not in conflict [with any provision of Porter-Cologne or any ruling of  
23 the State Water Board or a regional water quality control board], imposing further conditions,  
24 restrictions, or limitations with respect to the disposal of waste or any other activity which might degrade  
25 the quality of the waters of the state." (Ca. Wat. Code §13002, subd. (a).) This provision allows a local  
26 entity to prescribe more stringent conditions than the water boards have required, but prohibits a local  
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1 entity from interfering with a decision of a regional water quality control board or the State Water Board.  
2 (Opinion No. 65-306, 47 Ops. Cal. Atty. Gen. 40, 44 (1966).) Whether a local ordinance conflicts with  
3 water board requirements to such an extent that the ordinance is invalid is a matter of degree and must be  
4 determined on a case-by-case basis. (Id.) Where a regional board has issued WDRs allowing a  
5 discharge in a particular location, a county ordinance can prohibit discharges to that location as long as  
6 other suitable discharge locations exist within the county. (Id. at 44-45.) However, the county ordinance  
7 could not completely deny a sanitary district the right to discharge within the county, because such an  
8 ordinance would completely prohibit a discharge that the regional board authorized. (Id. at 47.)

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11 14. Although a cursory reading of this Attorney General opinion might seem to support the  
12 Initiative, a closer examination compels the opposite conclusion. The practical effect of the Initiative  
13 would be to cause the violations of the Basin Plan's septic system discharge prohibition to continue  
14 indefinitely; to make it impossible for the District to comply with TSO 00-131 or the Cease and Desist  
15 Orders; and to frustrate the State Water Board's loan commitment, which requires a notice to proceed by  
16 September 20, 2005. The Initiative therefore conflicts with no less than seven rulings of the State Water  
17 Board and the Water Board. Just as a county could not completely prohibit a discharge that a regional  
18 water board authorized, a local law could not permit a discharge that a regional board has prohibited.  
19 The Initiative would have precisely that effect; currently prohibited discharges would continue  
20 indefinitely, causing continued water quality degradation and public resources harm.

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23 15. The Initiative allows the voters to select a "no project" alternative. This directly  
24 contradicts the Water Board's Cease and Desist Orders and TSO No. 00-131, makes it impossible for the  
25 District to comply with the State Water Board's notice-to-proceed deadline, and contradicts the  
26 Prohibition Zone in the Basin Plan.  
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Declaration of Lori T. Okun

-6-

1           16.     The Initiative does not define what sites are "in close proximity" to a residential building,  
2 library, school, community center, picnic area, playground, church, business center or other public  
3 gathering place, and thereby prohibited from consideration. It is not clear whether the current project  
4 site satisfies this criterion. Any site approved by the voters would therefore be vulnerable to a challenge  
5 that the site was in too close proximity to a residence or public gathering place, making it virtually  
6 certain that commencement of project construction would be delayed indefinitely. Again, this  
7 contradicts existing State Water Board and Water Board rulings. Since Los Osos and Baywood Park are  
8 small residential communities, it might eliminate all potential project locations within the District's  
9 jurisdictional boundaries. Opinion No. 65-306, cited above, prohibits that result.  
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12           17.     The Initiative is tantamount to a voter referendum on whether the Water Board's septic  
13 system prohibition should stand, in violation of Water Code Section 13302 and the proscription against  
14 voter initiatives that interfere with statewide mandates.  
15

16           18.     Allowing the electorate to gut the District's authority and unmake its valid decisions at  
17 this late date should be impermissible. The ability of the State Water Board and the regional water  
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Declaration of Lori T. Okun

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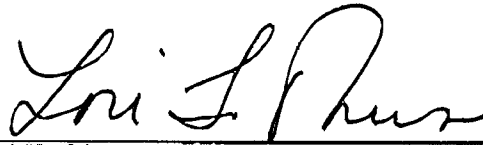
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1 quality control boards to protect water quality demands finality in the local decision-making process.

2 The Initiative frustrates statewide policy by eliminating any finality in this case.

3 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
4 true and correct.

5 Executed this 17 day of June, 2005 at Sacramento, California.

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10 Lori T. Okun  
11 Senior Staff Counsel  
12 STATE WATER RESOURCES CONTROL BOARD  
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IN AND FOR THE COUNTY OF SAN LUIS OBISPO

LOS OSOS COMMUNITY SERVICES  
DISTRICT,

Plaintiff and Petitioner,

v.

JULIE RODEWALD, County Clerk-Recorder and  
DOES 1 through 5000 inclusive,

Defendants and Respondents.

CITIZENS FOR A SAFE AND AFFORDABLE  
ENVIRONMENT, AL BARROW, GWEN  
HENRY, MARCIA MUNSON, ROBERT  
STARK, and other proponents and signatories of  
the Initiative petition,

Real Party in Interest.

NO.

DECLARATION OF ROGER W. BRIGGS  
IN SUPPORT OF ALTERNATIVE WRIT

Date: June 21, 2005  
Time: 1:30 p.m.  
Dept.: Veterans Memorial Building,  
100 Grand Ave.  
Judge: Douglas G. Hilton

I, Roger W. Briggs, declare as follows:

1. I am the Executive Officer of the Central Coast Regional Water Quality Control Board  
(Water Board). I have been an employee of the Water Board since 1975, and have been working on  
issues related to septic system dischargers within the Los Osos/Baywood Park area since approximately

Declaration of Roger W. Briggs

cg



1 1980. From 1981 to 1987, I was a Senior Water Resources Control Engineer. From 1987 to 1994, I was  
2 the Assistant Executive Officer. I have been the Executive Officer for eleven years.

3 2. The Water Board has been actively involved in regulating septic system discharges in Los  
4 Osos and Baywood Park for over three decades. The County of San Luis Obispo and later, the Los Osos  
5 Community Services District have tried for a combined quarter century to build a project to be able to  
6 eliminate the illegal discharges in Los Osos and provide proper wastewater treatment and disposal.  
7 While both entities have a near perfect record in defending a variety of legal challenges (approximately  
8 fifteen) from various groups and individuals who share the distinction of being illegal dischargers, the  
9 tactic of filing law suit after law suit has had the effect of preventing the project from being completed.  
10 As the State of California agency with primary jurisdiction over water quality throughout California's  
11 Central Coast, the Water Board is extremely concerned about this tactic because of the likelihood that it  
12 will cause the illegal septic discharges in the Los Osos/Baywood Park area to continue indefinitely.  
13

14 3. The Water Board first addressed pollution resulting from septic system discharges in  
15 1971, when it adopted its Interim Basin Plan. A true and correct copy of pages 24 and 51 of the Interim  
16 Basin Plan are attached to this Declaration as Exhibit A. The Interim Basin Plan states: "In the Los  
17 Osos-Baywood Park area of San Luis Obispo County, specifically Section 13, 23 and 24 of T30SR10E  
18 and Sections 7, 17, 18, 19 and 20 of T30SR11E, MDB&M, after July 1, 1974 all proposed and existing  
19 waste discharges will be prohibited." (Exhibit A, page 51.) The Interim Basin Plan further states:  
20 "Selected wells in the Baywood Park-Los Osos area also indicate high nitrate levels ..." (Exhibit A, page  
21 24.).  
22

23 4. In the late 1970's and the early 1980's the County studied wastewater management issues  
24 in the area and monitored groundwater in the Los Osos area and found significant problems associated  
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1 with septic system discharges in the area. In 1983, the Water Board adopted Resolution 83-13,  
2 amending the Basin Plan to prohibit discharges from septic systems in a Prohibition Zone within Los  
3 Osos and Baywood Park. The Water Board based the prohibition on a decade of studies of the water  
4 quality problems that septic systems within that Prohibition Zone were causing. The prohibition took  
5 effect in 1988, to allow a reasonable amount of time for project construction, but illegal use of septic  
6 systems continues to this day because no waste treatment plant has ever been available to businesses and  
7 residences within the Prohibition Zone.  
8

9  
10 5. The Water Board issued Time Schedule Order (TSO) No. 00-131 to Petitioner Los Osos  
11 Community Services District (District) in 2000. TSO No. 00-131 established a time schedule to bring  
12 the District into compliance with four 1999 Cease and Desist Orders that required the District to cease  
13 its discharges to septic systems serving Bayridge Estates, the Vista de Oro subdivision and two District  
14 facilities (CDOs Nos. 99-53 through 99-56). The TSO requires the District to commence construction of  
15 a community sewer system by September 6, 2002, and to complete construction of the community sewer  
16 system by August 30, 2004. The District is almost three years in arrears of the construction  
17 commencement date. Although Water Board staff has advised the District that staff does not intend to  
18 recommend enforcement of the TSO's \$10,000 per day penalty if delays are beyond the District's  
19 control, the TSO schedule has never been revised and remains fully enforceable.  
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22 6. The District designed and selected the treatment plant project and certified the  
23 environmental impact report in March 2001. The current plant location has been part of the current  
24 project since the project's inception. The Water Board issued waste discharge/recycled water  
25 requirements (WDRs), which authorize discharges from the selected treatment plant project in 2003.  
26 (Water Board Order No. R3-2003-0007 A true and correct copy of the WDRs is attached to this  
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1 Declaration as Exhibit B.) None of the proponents of the Initiative legally challenged the WDRs.  
2 California Cities Water Company filed an action claiming, among other things, that the WDRs would  
3 not adequately protect groundwater quality. The Water Board prevailed in that case. (San Luis Obispo  
4 Superior Court Case No. CV 030735.)  
5

6 7. The State Water Resources Control Board (State Water Board) extended a low-interest  
7 loan to fund the selected treatment plant project in January 2005. The loan commitment requires the  
8 District to issue a notice to proceed with construction by September 20, 2005. State Water Board staff  
9 has limited authority to extend this deadline for 90 days for "good cause."  
10

11 8. The California Coastal Commission specifically authorized the treatment plant site in  
12 August 2002, and again when it adopted a coastal development permit for the project in August 2004.  
13 The Water Board's WDRs and the State Water Board's loan are both based on the current project and  
14 site. All legal challenges to the WDRs and Coastal Commission permit have been resolved in the  
15 District's favor.  
16

17 9. If this court allows the Initiative to proceed, its inevitable effect would be an  
18 unacceptable, illegal delay to the project or, more probably, to kill the project completely. At the  
19 January 2005 hearing extending the loan commitment, the State Water Board explained that the loan  
20 funds allocated to the Los Osos project were desperately needed to fund projects in other communities  
21 throughout the state, and that the loan fund did not have adequate resources to fund other projects that  
22 were approved and ready to go. The State Water Board members were clear that the loan was for the  
23 proposed project at the proposed location only, and that any alternative project would require a new loan  
24 application. The new application would be subject to the same ranking criteria as any other new  
25 application, and Los Osos would lose its "place in line" for low-interest funding. It is my opinion that  
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1 the District will lose its State Board funding unless it issues a notice to proceed by September 20, 2005  
2 or obtains a "good cause" extension (which may not exceed 90 days from September 20, 2005) from  
3 State Water Board staff. I am informed and believe that the District would be unable to construct any  
4 project at all without the State Water Board loan.  
5

6 10. The Porter-Cologne Water Quality Control Act, Water Code sections 13000 et seq.  
7 ("Porter-Cologne") establishes the nine regional water quality control boards and the State Water Board.  
8 Porter-Cologne explicitly states that water quality is an issue of statewide concern. (Ca. Water Code  
9 §13000.) The regional water quality control boards and State Water Board are State agencies charged  
10 with primary responsibility for the coordination and control of water quality. (Ca. Water Code §13001.)  
11 Although the Water Board's jurisdiction is regionally limited to California's Central Coast, it is a State  
12 agency subject to statewide coordination and policy that the State Water Board establishes.  
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15 11. Even other State agencies are subject to the water boards' primary jurisdiction in  
16 regulating water quality. For example, when the California Coastal Commission issues a coastal  
17 development permit to a wastewater treatment facility, it may not consider or impose conditions on  
18 water quality matters within water board jurisdiction, and cannot impose permit conditions that conflict  
19 with a determination by a regional water quality control board or the State Water Board. (Ca. Public  
20 Resources Code, §30412, subd. (b) and (c).) State agencies that discharge waste that could impact water  
21 quality must obtain waste discharge requirements from the Water Board, and are subject to enforcement  
22 actions by the Water Board if they discharge without waste discharge requirements or in violation of  
23 them.  
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26 12. The Water Board adopted the Prohibition Zone as a provision of its Water Quality  
27 Control Plan, also known as the Basin Plan. All Basin Plan provisions require approval of the State  
28

1 Water Board. Basin Plans are quasi-legislative in nature. The Prohibition Zone is clearly a legislative  
2 act of the State of California.

3 13. The eleventh-hour Initiative would frustrate both general state policy regarding water  
4 quality and the specific actions the Water Board and State Water Board have taken to protect water  
5 quality in the Los Osos area.  
6

7 14. Porter-Cologne allows a local entity to prescribe more stringent conditions than the water  
8 boards have required, but prohibits a local entity from interfering with a decision of a regional water  
9 quality control board or the State Water Board. (Ca. Water Code §13002.) The effect of the Initiative  
10 would be to cause the violations of the Basin Plan's septic system discharge prohibition to continue  
11 indefinitely; to make it impossible for the District to comply with TSO No. 00-131 or the Cease and  
12 Desist Orders; and to frustrate the State Water Board's loan commitment, which requires a notice to  
13 proceed by September 20, 2005. The Initiative therefore conflicts with no less than seven rulings of the  
14 State Water Board and the Water Board. Currently prohibited discharges would continue indefinitely,  
15 causing continued water quality degradation and public resources harm. Allowing the voters (most of  
16 whom, in this case, are illegal dischargers) to select a "no project" alternative would also directly  
17 contradict the Water Board's prohibition. Further, it would serve to stand society's law on its ear. A  
18 speeder who is ticketed and found guilty cannot escape enforcement by collecting petition signatures.  
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22 15. The Initiative prohibits sites that are "in close proximity" to a residential building, library,  
23 school, community center, picnic area, playground, church, business center or other public gathering  
24 place, but does not define "close proximity." It is not clear whether the current project site satisfies this  
25 criterion. Since Los Osos and Baywood Park are small residential communities, this requirement will  
26 likely eliminate all potential facility locations within the District's jurisdictional boundaries.  
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16. The Initiative that is the subject of this action will thwart the community's efforts to build a wastewater treatment plant in order to comply with the Water Board's septic discharge prohibition and related Water Board enforcement orders. The Initiative is tantamount to a voter referendum on whether the Water Board's septic system prohibition should stand.

17. When the electorate created the District in 1998, it gave the District the power to design a project, select a location for the project, and acquire the necessary property to build the project. I am informed and believe that the District has not exceeded its authority or its mandate. Allowing the electorate to gut the District's authority and unmake its valid decisions at this late date should be impermissible. The ability of the State Water Board and the regional water quality control boards to protect water quality demands finality in the local decision-making process. The Initiative frustrates statewide policy by eliminating any finality in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 17<sup>th</sup> day of June, 2005 at San Luis Obispo, California.

*Roger W. Briggs*  
Roger W. Briggs

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